

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.25 OF 1992

Dhondiba Shankar Jagtap
(since deceased) by his LRs.
1a) Smt.Vithabai Dhondiba Jagtap ..
1b) Tukaram Dhondiba Jagtap ..
1c) Prakash Dhondiba Jagtap
Res.Nos.1a to 1c, Res.
at Shirsavadi, near Mahur,
Tal.Purandar, Dist.Pune ..
1d) Sou.Sushila Vasant Khopade
Res.atDevanewadi, Tal.Purandar,
Dist.Pune .. Appellants.

Vs.

1. Shri Genba Shankar Jagtap ..
2. Balu Mahadu Raut ..
3. Popat Krishna Raut ..
4. Arjun Krishna Raut ..
5. Tulsiram Appa Raut ..
6. Jagannath Appa Raut ..
7. Shankar Appa Raut ..
8. Dattu Appa Raut ..
9. Narayan Appa Raut
Res.at Shirsavadi near Mahur,
Talukar Purandhar, Dist.Pune .. Respondents.

Mr.C.R.Dalvi i/b Mr.M.L.Patil for the appellants.
Mr.Uday Warunjikar for respondent no.1.

CORAM : D.B.BHOSALE, J.

DATED : 7TH MARCH, 2007

ORAL JUDGMENT:

. This second appeal by original defendant nos.1 and 2 challenges a judgment and order 10.12.1991 rendered by the Vth Additional District Judge, Pune in

regular civil appeal no.346 of 1988 by which the appeal was allowed and as a result thereof a regular civil suit no.175 of 1982 instituted by the deceased respondent no.1 - plaintiff for declaration that he has one half share in the suit property and for injunction came to be decreed.

2. The substantial questions of law to which my attention was drawn by Mr.Dalvi, learned counsel for the appellant being ground nos.J and K, as formulated in the memo of appeal, are as follows:

"(j) Whether the learned District Judge is justified in disregarding that inspite of Respondent No.1/Plaintiff's contention of partition of 1962 the very fact that he has waited upto 1982 to file the present suit clearly raises a doubt as regards is claim ?

(k) Whether the learned District Judge is justified in relying merely on affidavit dated 2nd February 1983 purportedly of Appellant No.1 which is identified by the Plaintiff's Advocate which clearly raised a doubt as to the manner in which the said affidavit is obtained especially when the evidence on record clearly shows that Appellant No.1 is illiterate and cannot read or write and further is mentally disturbed on account of death of his son in railway accident in 1979?"

3. The factual matrix to the extent as may be necessary and relevant to consider, the substantial questions of law, briefly stated, is as under:
Defendant no.1 - Dhondiba Jagtap and the deceased plaintiff - Genba Jagtap were brothers and the sons of

one Shankar Jagtap. Defendant no.2 - Vithabai is the wife of Dhondiba. During pendency of this appeal defendant no.1 - Dhondiba also died and hence his heirs were brought on record being appellant nos.1a to 1d. Defendant no.1 was the eldest son of Shankar. One half share in the land bearing Gat Nos.1354 and 1357 situated at Mauje Parinche, Taluka Purandhar, District Pune is in dispute. For short one half share in these Gat numbers will be referred to as "suit property", whereas the Gat numbers, as whole, will be referred to as "suit Gat numbers". In the present appeal the plaintiff has claimed one half share out of the suit property. The suit Gat numbers are standing in the name of original defendant no.1 - Dhondiba and other co-owners and as a result thereof the suit property also stands in the name of Dhondiba.

4. The suit Gat numbers were purchased by Dhondiba and others in 1951 and 1955 in two instalments. According to the plaintiffs, the suit property was purchased out of the income of the joint family and by selling their mothers' ornaments as also from the income earned by him and his mother from labour work. The case set up by the deceased plaintiff further is that there was partition in 1962-63 between him and defendant no.1 in which $\frac{1}{2}$ th share each in the suit property, that is, $\frac{1}{4}$ th in the

suit Gat numbers, was taken by them both. The plaintiff claims that the partition was reduced in writing in 1966-67, though he was in possession of his 1/4th share since 1962 and was cultivating it separately without any disturbance by the defendants. The defendants, however, started disturbing his possession which forced him to file present suit for declaration and injunction.

5. The defendants have denied the case set up by the plaintiff and have stated that the suit properties were purchased by defendant no.1 out of his separate income. In other words the suit properties are self acquired properties of defendant no.1 purchased by him out of his own income and, therefore, the plaintiff is not entitle for any share. They have specifically stated that since the joint family properties were not yielding sufficient income, defendant no.1 was forced to work at Mumbai in Bilimoriya Mill and also at Bilimoriya in Gujrat. Out of the income earned by him from service in the Mill he purchased the suit properties in 1951 and 1955.

6. The plaintiffs examined himself as also three other witnesses including two co-owners of the suit Gat numbers and the Revenue Circle Inspector, who had recorded statement of defendant no.1 in the enquiry

proceedings in respect of the suit lands. As against this the defendants examined their son - Tukaram in support of their case. Several documents were produced on record by both the sides. Defendant no.1 did not step into witness box, which has been explained by his son - Tukaram stating that after the death of his brother in 1979, defendant no.1 suffered mental shock and since then he has been suffering from mental disorder and was not in a position to give evidence in the case.

7. I have heard learned counsel for the parties and with their assistance went through the record including the evidence of the witnesses to which my attention was drawn. Mr.Dalvi, learned counsel for the appellants, at the outset submitted that the conduct of the plaintiff of keeping silent for 20 years, that is, from 1962 to 1982 and to file a suit at such belated stage clearly raises doubt about his claim. Against the backdrop of the factual matrix, as stated in the preceding paragraphs, Mr.Dalvi invited my attention to the statement of P.W.1 recorded by the Revenue Circle Inspector dated 17.6.1989 (Exhibit-88), the affidavit dated 2.2.1983 of defendant no.1 made before the Civil Judge, Junior Division, Saswad (Exhibit-91) and two mutation entries bearing Exhibit-89 and 90 to contend that these documents were

wrongly relied upon by the courts below. These documents were exhibited without following the due procedure. He submitted that in any case these documents cannot be looked into in evidence since they were not shown to the witness, and more particularly to Tukaram (D.W.1) seeking his explanation in respect thereof. They were neither proved nor referred to by the plaintiff in their evidence. Insofar as the affidavit dated 2.2.1983 is concerned, he submitted that it ought to have been shown to Tukaram, the son of defendant no.1, during his cross examination and allowed him to explain. This was necessary in view of the fact that defendant no.1 in the affidavit was identified by the advocate for the plaintiff. He submitted the manner in which the affidavit was sworn, it raises doubt about its authenticity. He then submitted that the judgment of the appeal court is mainly based upon these documents and if they are discarded the appeal will have to be allowed. In support of this contention he took me through the evidence as well as other documents on record.

. On the other hand Mr.Warunjikar, learned counsel for the respondent invited my attention to the findings recorded by the appellate court wherein the appeal court has considered the statement of defendant no.1 (Exhibit-88) recorded by the revenue circle

inspector (P.W.5) as also the deposition of Tukaram, the son of defendant no.1 (D.W.1) and contended that the appeal court has appreciated the evidence in proper perspective and has rightly recorded the findings that the suit properties are joint family properties of the deceased - plaintiff and defendant no.1 and they were purchased by them out of the income of joint family and they are not self-acquired properties of defendant no.1. He submitted that insofar as Exhibit-88 and Exhibit-91 are concerned, these documents were exhibited by the trial Court and at no stage the objection was raised by the learned counsel for the appellant-defendant either in the course of trial or before the appellate court and therefore, it is not open for the appellants to raise such contention for the first time in the second appeal. He further submitted that even if it is assumed that the appellants-defendants can raise such contention, still it deserves to be rejected for more than one reason. Firstly, it cannot be stated that Exhibit-88 was not referred to or shown to the witness. As a matter of fact, he submitted that, P.W.5 was examined only to prove Exhibit-88, the statement of defendant no.1. He then submitted that D.W.1 in his evidence (examination-in-chief) did not make any attempt to explain either Exhibit-88 or Exhibit-91. He submitted that even if these two

documents are kept aside the defendants have clearly failed to establish that the suit properties are self acquired properties of defendant no.1. He submitted that the evidence on record clearly demonstrates that when the properties were purchased, the family was joint and in 1951 and 1955 defendant no.1 had no independent source of income.

8. I went through the evidence on record to appreciate the arguments of the learned counsel for the parties. Before I proceed further a few admitted facts will have to be noticed. Admittedly, the suit Gat numbers have purchased in the name of defendant no.1 - Dhondiba with other co-owners, who were joined as defendant nos.3 to 10 in the suit. The first sale deed was executed on 27.12.1951 whereas the second sale deed was executed on 20.6.1955. Admittedly, one half share in the suit Gat numbers is standing in the name of Dhondiba. In 1951, when the suit Gat numbers were purchased the plaintiff was hardly 9-10 years old. The exact age or the year of birth of defendant no.1 is not available on record.

9. The appeal court reversed the judgment and decree dated 28.1.1988 taking into consideration the following oral, documentary and circumstantial evidence; defendant no.1 did not step into witness

box; no satisfactory evidence in support of his mental illness was produced on record; the statement of defendant no.1 dated 17.6.1981 (Exhibit-88) in which defendant no.1 had clearly admitted that he purchased the suit properties for and on behalf of the joint family; the affidavit dated 2.2.1983 (Exhibit-91) in which he clearly admits that the suit properties were purchased on behalf of the joint family; the evidence of revenue circle inspector (P.W.5) which proved the statement at Exhibit-88; evidence of Tukaram wherein he has clearly admitted that his father defendant no.1 started residing in Bombay from 1959 to 1966. After having taken this evidence into consideration the appellate court held that defendant no.1 had no independent income when the suit properties were purchased. The evidence of P.W.2 and P.W.4, the co-owners, also support the case set up by the plaintiff. The evidence of revenue circle inspector, which was found to be sufficient to prove the statement of Defendant no.1 (Exhibit-88) and the evidence of the plaintiff's witness clearly demonstrate that the plaintiff was in possession of his 1/4th share in the suit Gat numbers.

10. I perused the evidence of all the witnesses and more particularly P.W.1 - Genba and D.W.1 - Tukaram. I also perused the documents on record, to

which my attention was specifically drawn, including roznama dated 27.1.1988 and 28.1.1988. The roznama clearly demonstrates that several documents including Exhibits-88, 89, 90 and 91 were taken on record with an endorsement of the learned Judge "read and referred in the evidence" thereby indicating that no objection was raised by the defendants either at the stage of exhibiting those documents in the trial Court and reading and referring them in the evidence or at any subsequent stage of the proceedings. No specific objection was raised to the statement of defendant no.1 recorded by revenue circle inspector (P.W.5) on 17.6.1981. A perusal of these documents clearly show that defendant no.1 - Dhondiba in unequivocal terms had admitted that the suit Gat numbers were purchased by him and the other co-owners, for and on behalf of his brother, the deceased - plaintiff, and both have equal share in the suit properties. His statement was recorded by revenue circle inspector. He was examined by the plaintiff as P.W.5 to prove this statement. The statement (Exhibit-88) was shown to this witness and he identified it being recorded by him. It, therefore, cannot be said that the statement was not referred to during evidence and it has not been proved and hence not admissible in the evidence. The appeal court in paragraph 13 and 14 has appreciated this document as also the affidavit dated 2.2.1983

(Exhibit-91) to hold against the defendants. The affidavit was sworn before the Civil Judge, Junior Division, Saswad. I find no reason to discard these two documents, however, in order to test the submissions of Mr.Dalvi, learned counsel for the appellants I would also like to examine the case keeping these two documents aside.

11. The plaintiff has stated that there was oral partition in 1962 and since then he started residing and cultivating his 1/4th share in the suit Gat numbers separately. Though this assertion of the plaintiff, in the pleadings and in his examination in chief was denied by the defendants, their case regarding partition is not clear. Tukaram (D.W.1) in his evidence (examination-in-chief) has made few statements suggesting that there was partition between his father - Dhondiba and the deceased plaintiff before his birth. He has stated, when was born on 1.6.1945 the partition had already been effected between the plaintiff and Dhondiba. He has also stated in the examination-in-chief that the plaintiff and his father did not form the joint family at the time of his birth. To my specific query made to Mr.Dalvi regarding the age of the plaintiff, he submitted that the plaintiff was born sometime in 1942. If that be so and if the evidence of Tukaram is

true, the age of the plaintiff when so called partition was effected would be hardly 2-3 years. Defendant no.1, however, did not choose to step into witness box to state anything about so called partition which according to Tukaram was effected prior to his birth. Therefore, the case of the defendant has rightly been rejected insofar as the partition is concerned and the case set up by the plaintiff about the partition has rightly been accepted by the appeal court. The evidence of Tukaram though in general is vague, he has specifically stated that his father was in service from 1959 to 1976 at Bombay and prior to that he was at Bilimoriya. He has not given further particulars in respect of the period prior to 1959 or has not stated anything more about the service of his father in Mumbai or Bilimoriya. He has specifically stated that his father was about 20 years old when the properties were purchased and he was in Mumbai working in Bilimoriya Mill. On the basis of these statements of Tukaram, it is clear that defendant no.1 was in Mumbai in 1959 onwards, whereas the suit properties were purchased in 1951 and 1955. This falsify the very foundation of the defendants case that the suit property is self acquired property of defendant no.1. The exact date of birth or exact age of defendant no.1 is not reflected anywhere on the record. If the evidence of Tukaram (D.W.1) is

accepted as it is, it is clear that his father started working sometime in 1959 and even if it is assumed that he started working prior to 1959, definitely it cannot be stated that he was working prior to the sale deeds by which the suit properties were purchased in 1951 and 1955. It is thus clear, the case that defendant no.1 had independent income from which he purchased the suit property itself has not been proved by the defendants. Tukaram has stated that defendant no.1 was suffering from some mental illness and hence he did not come forward to give evidence in support of his assertion. According to Tukaram (D.W.1) after the accidental death of his brother, his father - Dhondiba suffered mental shock and since then mentally he is not sound and normal. The son of defendant no.1 died sometime in 1979. However, it reveals from the record that even thereafter defendant no.1 was absolutely normal. His statement at Exhibit-88 and affidavit at Exhibit-99 are of 1982-83. There are few more documents on record which are at Exhibit-95 dated 29.3.983 and Exhibit-96 dated 5.7.1983, the letters of defendant no.1, addressed to Tahsildar and D.S.P. Pune respectively which further support that defendant no.1 was not suffering from mental illness as contended by the appellants.

12. The record reveals that the joint family had

income, though meagre, from their ancestral property. The plaintiff has also stated that since the income was meagre his mother was doing labour job. He has also stated that for purchasing the suit properties the ornaments of his mother were sold. Moreover, admittedly until 1962 the family was joint. This clearly provides the nucleus for purchasing the suit property. The revenue record supports the case of the plaintiff that he started cultivating the lands separately after 1962. I do not find any reason to interfere with the findings of fact as I find sufficient material on record to sustain those findings nor did I find any perversity in appreciation of the evidence by the appeal court warranting interference by this court in extremely limited jurisdiction of this court to disturb the findings of fact. In the circumstances this second appeal is dismissed with costs.

(D.B.Bhosale, J.)